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No. 574

IN THE

Supreme Court of the United States

October Term, 1952

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on November 13, 1952 affirming an order of the Federal Power Commission issued on July 12, 1951 ordering Wisconsin Power and Light Company (hereinafter referred to as "Power and Light") to file rate schedules for sale of electric energy to four municipalities in Wisconsin for resale.

OPINION BELOW

The opinion of the Court of Appeals (R. .....) is reported in ..... F. 2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1952. The jurisdiction of this court is invoked under 16 U. S. C. sec 825 *l* (b) and 28 U. S. C. sec. 1254 (1).

QUESTIONS PRESENTED

1. Where electric energy is generated in Illinois and sold to Power and Light at the Illinois-Wisconsin state line, and by the latter carried into Wisconsin, where the voltage is reduced and then sold to 4 Wisconsin municipalities for resale (wholesale sales), the latter sales being made from lower voltage lines from which sales at retail are also made, is Power and Light a "public utility" as defined in Section 201 (e) of the Federal Power Act (16 U. S. C. sec 824 (e)) and has the Federal Power Commission jurisdiction to regulate rates for such sales for resale to said 4 municipalities under Sections 201 (b) and 205 of the Federal Power Act (16 U. S. C. secs. 824, 824 d?

2. Whether continued regulation of rates for the sales of electric energy by Power and Light and its predecessor in title for resale (wholesale sales) to each of the 4 municipalities involved in this case by the State of Wisconsin through its regulatory agencies (Railroad Commission of Wisconsin and its successor, Public Service Commission of Wisconsin) for some forty years preclude Federal Power Commission jurisdiction to regulate rates for the identical sales?

3. Whether the dividing line between conflicting jurisdictional claims between state and federal regulatory agencies under Part II of the Federal Power Act (16 U. S. C. secs. 824-824h) is to be determined on the basis of whether sales of interstate electric energy involved are "wholesale" or "retail?"

4. Whether *all* sales of electric energy in interstate commerce for resale, including those by Power and Light

here involved, are beyond the constitutional powers of the State under the Commerce Clause and are subject only to federal regulation, even in the absence of Congressional action?

5. Whether the portion of Section 201 (b) of the Federal Power Act (16 U. S. C. sec. 824 (b)) which provides that the Federal Power Commission "shall not have jurisdiction over facilities used in local distribution" applies and excludes Federal Power Commission jurisdiction under the circumstances in this case?

6. Whether (a) the particular facilities used to deliver electric energy to each of four Wisconsin municipalities for resale are "facilities used in local distribution" within the meaning of that language as it appears in Section 201 (b) of the Act (16 U. S. C. sec. 824 (b)), or (b) if the term "facilities" means the entire plant and property of Power and Light involved, does it constitute "facilities used in local distribution?"

7. In the event either the particular facilities or the entire plant or property constitute "facilities used in local distribution," are said sales to the 4 Wisconsin municipalities sales for resale subject to Federal Power Commission jurisdiction for rate making purposes under sections 201 and 205 of the Act (16 U. S. C. secs. 824, 821d)?

8. Whether sales of electric energy by Power and Light to the said 4 Wisconsin municipalities for resale are "sales at wholesale" within the definition of Section 201 (d) of the Federal Power Act (16 U. S. C. sec. 824 (d))?

9. Whether the court erred in relying on *Wisconsin Michigan Power Co. v. Federal Power Commission,* (7th

cir.) 197 F. 2d 472, petitions for certiorari filed in cases entitled *Wisconsin Michigan Power Co. v. Federal Power Commission,* No. 291 October Term 1952, and *State of Wisconsin and Public Service Commission of Wisconsin v. Federal Power Commission,* No. 294 October Term 1952?

10. Whether decisions of the Supreme Court stating the intent and purpose of and construing the Natural Gas Act (15 U. S. C. secs. 717-717w) are controlling as to the intent and purpose and meaning of the Federal Power Act (16 U. S. C. sec. 791a. et seq.)?

STATUTES INVOLVED

The material portions of the Federal Power Act (16 U. S. C. secs. 791a-825r) are printed in an appendix to this petition.

STATEMENT

1. *Case presents jurisdictional conflict between state and federal regulatory agencies involving same subject matter.*

The Federal Power Commission order involved purports to assume jurisdiction to prescribe rates for electric energy sold in the State of Wisconsin by Power and Light to the Wisconsin municipalities of Benton, Cuba City, Hazel Green and Shullsburg (having 1950 populations of 842, 1333, 635 and 1306 respectively) for resale.

The rates now charged for such sales are those prescribed by the Public Service Commission of Wisconsin. Regulation by the State of Wisconsin through its agencies, the Railroad Commission of Wisconsin and the Public Service Commission of Wisconsin, over the rates for these very sales has been continuous since 1910 down to the present. R. 47-49, 58-134.

2. *Operations of the "Platteville Division" giving rise to the jurisdictional conflict.*

All questions presented grow out of the operation of an electric system located in a small area in southwestern Wisconsin known as the "Platteville Division." There is no dispute as to the facts concerning the location and nature of the plant involved or as to method of operation. There is a dispute as to conclusions drawn from these facts. At the time of hearing before the Federal Power Commission (June 8 and 9, 1950) the "Platteville Division" was owned and operated by Interstate Light and Power Company

(Wisconsin). Power and Light took over its ownership and operation commencing July 1, 1950. R. 223. The record before the administrative agency is based on the operations as carried on by Interstate of Wisconsin as of June 8 and 9, 1950.

The "Platteville Division" supplies electric energy to (a) the City of Platteville, Wisconsin (population 5751) at retail; (b) 376 rural customers at retail; (c) 7 industrial customers at retail; (d) communities of Benton, Cuba City, Hazel Green and Shullsburg at retail. Substantially all of the electric energy sold to both the retail and wholesale customers served by the "Platteville Division" was obtained by purchase of energy generated at Galena, Illinois, title passing at the Illinois-Wisconsin state line, pursuant to a contract filed with and approved by the Federal Power Commission. Total energy purchased in 1948 and 1949 was 40,872,000 KWH. R. 27, 50, 55, 56. In 1948 and 1949 the energy sold to said 4 communities at wholesale was about 21% and that sold the 7 industrial customers at retail was about 22% of the total purchased from Interstate of Illinois. R. 30-35, 40, 50-56.

Two 34.5 KV lines located in Wisconsin known as Lines 1 and 2 connect with lines of Interstate of Illinois at the Illinois-Wisconsin state line, which latter lines connect with the steam generator at Galena, Illinois. Line No. 1 then proceeds 18.27 miles via the Hazel Green and Cuba City substations to a substation, where the energy is reduced to 4 KV and distributed at retail to Platteville.

Line No. 2 proceeds 12.93 miles via the Hazel Green substation to a substation at or near Shullsburg. It is also tapped at a point 6.41 miles east of the Hazel Green sub-

station by a line extending .91 mile southward to the Murphy substation and at a point .83 mile from Shullsburg by a line which extends southward to substations at the Calumet and Hecla Mine and an additional .95 mile to a substation at the Vinegar Hill Mine. R. 27-34, 50-53; Exhibits 1 and 2.

About seven 4 KV lines radiate from various substations. The sales to Benton, Cuba City and Hazel Green are made at the end of separate 4KV lines 6 miles or less in length extending from the Hazel Green or Cuba City substations. R. 27-31. The sale to Shullsburg is made at the Shullsburg substation at the end of the 34.5 KV Line No. 2 at or near the municipality after energy is reduced to 4 KV and metered, title passing after reduction in voltage and metering. R. 28-33, 39-41, 51-53; Exhibits 1 and 2.

A total of 376 rural customers, principally farmers, are also served *at retail* (and hence are ultimate consumers) off the 4 KV lines radiating from said substations, including a considerable number of whom are served from the very 4 KV lines serving Benton, Cuba City and Hazel Green. R. 34-37 The energy is carried to the premises of these rural customers at 4 KV and then reduced to 230 or 115 volts before delivery. R. 37-41.

Seven industrial customers (6 mines and 1 milling company are also normally served *at retail* (and hence are ultimate consumers) by various 34.5 KV lines which tap Line No. 2. These lines extend to or near the premises of the customers where the energy is reduced to 4 KV or lower voltage and then delivered. R. 32-35, 51-52. In 1948 and 1949 *these* retail industrial customers were sold 9,148,255 KWH, or about 22% of the total purchased by Power and Light from Interstate of Illinois. R. 35.

REASONS FOR GRANTING THE WRIT

1. CASE PRESENTS JURISDICTIONAL CONFLICT BETWEEN STATE AND FEDERAL REGULATORY AGENCIES INVOLVING A FIELD, THE SIGNIFICANCE AND IMPORTANCE OF WHICH HAS BEEN RECOGNIZED BY THIS COURT.

The Federal Power Commission order here involved (which was affirmed by the Court of Appeals on authority of *Wisconsin Michigan Power Co. v. Federal Power Comm.*, 197 F. 2d 472 (7th Cir.), (petitions for certiorari filed and pending at time of preparation of this petition—Nos. 291 and 294 October Term 1952)) also purports to assume jurisdiction over rates for sales of electric energy by a Wisconsin corporation to 4 Wisconsin municipalities for resale (wholesale sales), the rates for the identical sales which have been and now are being regulated by the State of Wisconsin through its appropriate regulatory agencies since 1910 in case of the sales to Benton, Cuba City and Hazel Green, and in the case of Shullsburg since about 1937 when the sales to it began. Thus we have again a direct conflict as to whether the State of Wisconsin or the Federal Power Commission can regulate rates for such sales.

Such a conflict between state and federal regulatory agencies is in "one of the most sensitive areas of government," and is one in which the court has always been diligent in seeing that respective state and federal authority be kept in its allotted field and in not permitting federal encroachment upon state regulatory efforts unless plainly called for by affirmative grant. *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 532;

Davies Warehouse Co. v. Bowles, (1944) 321 U. S. 144, 154-156; *Palmer v. Massachusetts,* (1939) 308 U. S. 79, 83-84.

2. THE PROPER DELINEATION OF THE LINE BETWEEN FEDERAL AND STATE REGULATORY AUTHORITY IN THIS TYPE OF CASE WILL CONTINUE TO ARISE IN INCREASINGLY NUMBER OF CASES UNDER MODERN CONDITIONS IN THE INDUSTRY, AND HENCE IT IS IMPORTANT THAT THIS COURT FIX SUCH LINE.

By reason of modern day concepts of the electric business there has been and is a growing tendency to interconnect all electric generation and distribution systems, so that in the event of emergency through enemy action or otherwise, power will be available from alternative sources. Such interconnection inevitably results in creating innumerable situations where more or less interstate energy can come into a particular company's system then though that company is located entirely in one State and is engaged otherwise in a purely local and intrastate business. It is normal for every company to sell some electric energy at wholesale, and in the event, due to the fact some interstate energy may be involved due to an interconnection, the question will arise in an increasing number of cases as to whether the state regulatory agency or the Federal Power Commission has jurisdiction to regulate the rate for said sale, and it is important and necessary that this court fix the dividing line.

3. THE COURT OF APPEALS AND FEDERAL POWER COMMISSION HAVE NOT ONLY FAILED TO APPLY THE JURISDICTIONAL TEST LAID DOWN BY CONGRESS TO RESOLVE SUCH CONFLICT, BUT HAVE ERRONEOUSLY SUBSTITUTED ANOTHER FORMULA WHICH RENDERS THAT PRESCRIBED BY CONGRESS A NULLITY.

In the instant case both the Court of Appeals and the Federal Power Commission took the view that the question of whether the Power Commission or Public Service Commission of Wisconsin had jurisdiction in the instant case turned solely on whether the sales involved were "wholesale" or "retail." Thus, in its opinion the Court of Appeals stated in footnote 1:

> "The Commission made no finding that these sales were 'national in character.' The Company urges that such a finding was necessary. We disagree. *Where interstate transmission is involved, the controlling distinction is between wholesale and retail sales.* See *Panhandle Co. v. Michigan Commission*, 341 U. S. 329, 334 (1951); *Panhandle Pipe Line Co. v. Commission*, 332 U. S. 507, 517 (1947) ;*Colorado-Wyoming Co. v. Commission*, 324 U. S. 626, (1945). * * *" (Emphasis ours.)

In applying such a test the Court of Appeals has entirely ignored the prohibition or exeception laid down by Congress in that portion of Section 201 (b) of the Federal Power Act (16 U. S. C. sec. 824 (b)) which provides that the Power Commission "shall not have jurisdiction over facilities used in local distribution."

In *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 529-531, this court held said provision (1) was a limitation on jurisdiction of the Power Commission, (2) was the standard by which Congress was trying to apportion conflicting jurisdictional claims of state and federal regulatory agencies over the industry, and (3) was a provision which "the Commission must observe and the courts must enforce."

To make the case turn on whether the sales are "wholesale" or "retail" as done by the Court of Appeals, renders jurisdictional limitation over "facilities used in local distribution" in Section 201 (b) of the Act a nullity, since there would then be no situation in which it could reasonably be applied. This is so because Section 201 (b) (16 U. S. C. sec. 824 (b)) states:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but shall not apply to any other sale of electric energy* * * *." (Emphasis ours.)

Since by the specific limitation above quoted Part II of the Federal Power Act (16 U. S. C. secs. 824-824h) applies *only* to sales of electric energy at wholesale[1] in interstate commerce, and by *specific provision* shall not apply to "any other sale of electric energy," which can mean only a retail sale, to give any meaning and effect to this limitation over "facilities used in local distribution," it must be applied to "carve out" some authority granted earlier in Section 201 (b) over wholesale sales. See *Connecticut Light &*

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[1]It is sales at wholesale only which are regulated. **Jersey Central Power & Light Co. v. Federal Power Commission,** 319 U. S. 61, 72 (1943).

Power Co. v. Federal Power Comm., (1945) 324 U. S. 515, 528, note 6. Otherwise, the only conclusion that could be reached is that the jurisdictional limitation applies to sales at retail, which would not be a sensible conclusion since it is plain from the previous language in Section 201 (b) (16 U. S. C. sec 824 (b)) above quoted it has no jurisdiction over retail sales in any event. Such construction would be contrary to the rule that in construing statutes effect will be given to all parts thereof, and further that in adopting language Congress did not intend to do a useless act, which certainly would be the case if the jurisdictional limitation is applied to retail sales.

4. THE "WHOLESALE-RETAIL" SALE TEST RESTS ON A SUPPOSED PROPOSITION OF CONSTITUTIONAL LAW THAT ALL WHOLESALE SALES OF ELECTRICITY IN INTERSTATE COMMERCE ARE BEYOND THE CONSTITUTIONAL POWERS OF THE STATES. SUCH DOCTRINE, IF APPLIED TO ALL CASES IRRESPECTIVE OF THE PARTICULAR FACTS, WOULD LEAD TO ABSURD RESULTS.

The "wholesale-retail" sale test adopted by the Court of Appeals is based upon a supposed proposition of contitutional law that *all* sales of electric energy in interstate commerce (irrespective of the facts of the particular case) for resale are beyond the constitutional powers of the States, even in the absence of Congressional action, by reason of *Missouri v. Kansas Natural Gas. Co.*, (1924) 264 U. S. 298; *P. U. C. v. Landon*, (1919) 249 U. S. 236; *P. U. C. v. Attleboro S. & E. Co.*, (1927) 273 U. S. 83. We recognize that there are wholesale sales beyond the constitutional powers of the

States such as involved in the above cases and others, but we deny that *all* sales at wholesale by that token alone are beyond the constitutional powers of the State. To say all sales at "wholesale" are only constitutionally subject to federal regulation irrespective of any other consideration as the Court of Appeals has said here, is to make the case turn on a mechanical test, which is erroneous. *United States v. South-Eastern Underwriters Assn.* (1943) 322 U. S. 533, 548-50. We rely on the Cooley formula (*Cooley v. Port Wardens,* (1851) 12 How. (U. S. 299), and assert that where the wholesale sales in interstate commerce are purely local in character, as they are here and do not affect the national interest, the States can regulate in the absence of conflicting Congressional action, but where such sales are of such a nature as to bring the case fairly within the doctrine of *Public Utilities Comm. v. Attleboro Steam & Electric Co.,* 273 U. S. 83, and the cases above cited, the States cannot regulate them. In deciding the *Attleboro* Case (273 U. S. 83) the Supreme Court applied the Cooley test (*Cooley v. Port Wardens,* 12 How. (U. S.) 299) and determined whether the particular business there involved was essentially local or national in character (273 U. S. 83, 90) and concluded that the particular sales involved there affected the national interest.

If it is said that *all* sales at "wholesale" in interstate commerce affect the national interest for the sale reason they are "wholesale," and that the State of Wisconsin cannot constitutionally regulate *any* wholesale sale of electric energy in interstate commerce, and there can be no inquiry into the facts in each case to determine if the transactions there involved do or do not affect the national interest as required by the Cooley formula (as the Court of Appeals

here holds), then we would have a situation where federal regulation would have to be extended to every wholesale sale, no matter how insignificant in fact.

The instant case is a good illustration of the result of applying this erroneous concept that the line of demarcation between state and federal regulatory jurisdiction in this type of case lies solely upon whether the sale is "wholesale" or "retail." By it the court now sanctions Power Commission jurisdiction over sales by Power and Light to Benton (population 842), Cuba City (population 1333), Hazel Green (population 635) and Shullsburg (population 1306) of electric energy purchased by Power and Light at the state line and later simply because the sales are at "wholesale." Sales to these four small communities totalling an amount about equal to that sold 7 industrial customers at retail, obviously are purely local matters, and could by no stretch of the imagination be said to affect the national interest.

The result reached here also indicates how far the court has departed from the original concepts of proponents of legislation which became Part II of the Federal Power Act (16 U. S. C. secs. 824-824h). In reviewing the history of this legislation in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 525-527, the court referred to (p. 525) and quoted from a statement of Commissioner Seavey of the Power Commission to the House Committee (Hearings on H. R. 5423—74th Congress First Session, p. 384). Following is the statement of Mr. Seavey which was quoted by the court, plus one additional sentence which we emphasize:

" 'The new Title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State Regulation of electric utilities. It is conceived entirely as a supplement to, and not a substitute for State regulation. *Federal action is limited to those subjects that can effectively be handled only on a national scale.*' " (Emphasis ours.)

There is no possibility that Congress intended to preempt the entire field by passing Part II of the Federal Power Act (16 U. S. C. secs. 824-824h). The intent was to supplement but not to supersede state regulation. See *Connecticut Light & Power Co. v. Federal Power Comm., supra,* and especially pages 525-6, 529-31 and 533 of 324 U. S. for details as to Congressional intent on this point.

5. OTHER ERRORS INCLUDING ONE ON POINT INVOLVED IN CASES IN WHICH CERTIORARI HAS BEEN GRANTED THIS TERM.

(a) *Error in concluding that the portion of Section 201 (b) of the Federal Power Act (16 U. S. C. sec. 824 (b)) denying Power Commission jurisdiction over "facilities used in local distribution" does not apply.*

We submit that (1) the particular facilities used to supply energy to the 4 municipalities here involved are "facilities used in local distribution;" and (2) if not, that the entire "Platteville Division" falls within this classification; and if either situation exists as a result, the Power Commission does not have jurisdiction over the sales in-

volved here. *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 525, 530-534.

Benton, Cuba City and Hazel Green receive the energy they purchase from certain 4 KV lines. Such lines and the facilities between them and point of delivery to the municipalities in question are "facilities used in local distribution" because (1) said 4 KV lines serve rural customers at retail and hence must be characterized as "local distribution" since said customers are the ultimate consumers; (2) their status as "facilities used in local distrbution" is also established as a matter of law in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, where it is very clear (pages 533 and 534) that it is considered that such facilities begin in any event no later than at the commencement of subdividing the energy to serve the ultimate consumer[2]; and (2) that the only evidence in the record is that the 4 KV lines are distribution lines and that 4 KV was the "primary distribution voltage" at which energy is sold the industrial consumers. R. 37, 53.

The City of Shullsburg receives energy at the end of a 34.5 KV line tapped by other 34.5 KV lines which proceed to or near the premises of 7 industrial customers who purchase for their own use. Such energy is reduced to 4 KV at or near the point of delivery and sale to said retail customers. It is evident the essential function performed by said 34.5 KV lines and apparatus is to spread out and divide up the energy which enters said line for use by

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[2]In **Federal Power Comm. v. Arizona Edison Co.,** (C. A. 9) 194 F. 2d 679, (1952) the Power Commission **argued** (p. 681) that "local distribution" begins where the transmission in bulk at high voltages had ended and the subdivision of energy for delivery to customers at lower consumable voltages begins, and that the subdivision process begins at the substations.

customers, both retail as well as wholesale. Hence they must be considered as "facilities used in local distribution."

We also submit *all* the facilities in the "Platteville Division" are "facilities used in local distribution." In *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, after stating (p. 519) the nature of the facilities there involved, the court stated (p. 521) the predominant characteristic of the Company's over-all service was that of a local and intrastate service. The "Platteville Division" here involved serves one city (Platteville) population 5751 at retail, 376 rural customers, and 7 industrial customers at retail, and 4 municipalities for resale, and is much more of a local company than involved in the cited case. That company, which was comprehensively regulated by the State of Connecticut, served 107 municipalities in that State having a total population of 660,000 and also furnished substantially all the electric energy for local companies serving communities with population of 130,000. The court (p. 532) doubted whether it could be found its facilities are "facilities used in local distribution" within the meaning of Section 201 (b) of the Federal Power Act. 16 U. S. C. sec. 824 (b). In his dissenting opinion in *Federal Power Comm. v. East Ohio Gas Co.*, 338 U. S. 464, Mr. Justice Jackson, who delivered the opinion of the court in the *Connecticut Light & Power Case, supra*, stated (p. 486) that the latter case holds even the transmission lines of a statewide system supplying electric power to consumers in over a hundred communities are 'facilities used in local distribution.'

There are some differences between the facts here and those in the case cited, but they are not crucial. One 4 KV line running from the Hazel Green substation across the

Wisconsin-Illinois boundary line and thence westerly a short distance along such line is used solely to supply ultimate (retail) consumers located both in Wisconsin and Illinois. Also the "Platteville Division" connects with Interstate of Illinois at the state line. The existence of either factor in no way changes the fact that the business and operation of the "Platteville Division" is essentially and predominantly local and intrastate.

(b) *Error in concluding Wisconsin regulation over the sales involved does not preclude Power Commission jurisdiction over the same sales.*

The conclusion that continued Wisconsin regulation over the rates for the wholesale sales here involved does not preclude Power Commission jurisdiction over rates for such sales, also is based on said erroneous concept of constitutional law previously mentioned pages 13-16, *ante*. We submit that the Wisconsin regulation of the rate for such sales precludes Federal Power Commission jurisdiction of the same subject matter on the following grounds: (1) Wisconsin can constitutionally regulate such sales (see pages 13-16, ante); (2) the last clause of section 201 (a) of the Act (16 U. S. C. sec. 824 (a)), coupled with clear statements of Congressional intent to the effect there was no intent to interfere with or supersede state regulation, make it clear that the Federal Power Commission was not to have jurisdiction where the States were exerting their regulatory powers; (3) the intent of Congress, when ascertained, is the law and must be given effect as such. *National Bank v. Matthews*, (1878) 98 U. S. 621, 626; *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 212.

(c) *The error in holding sales to municipalities for resale are within the definition "sale at wholesale" in Section 201 (d) (16 U. S. C. sec. 824 (d)). This question is involved in cases where certiorari has been granted this term.*

This error arises from the refusal of the court to follow the clear and unambiguous language in Sections 3 (3), 3 (4) and 3 (7) of the Federal Power Act (16 U. S. C. sec. 796 (3), (4) and (7)) which excludes a municipality from the word "person" in Section 201 (d) and its refusal to follow the specific language in Section 201 (f). 16 U. S. C. sec. 824 (f). This point is involved in *United States v. Public Utilities Comm. of California and California Electric Power Co.*, No. 205, and *The County of Mineral, Nevada v. Public Util. Comm. of Calif. and Calif. Elec. Power Co.*, No. 206, certiorari granted October 13, 1952 and ordered transferred to the summary docket on October 27, 1952. It is also presented by the petitions for certiorari now pending in *Wisconsin Michigan Power Co. v. Federal Power Comm.*, No. 291, and *State of Wisconsin and Public Service Commission of Wis. v. Federal Power Comm.*, No. 294, October Term 1952.

(d) *The error in considering and adopting decisions construing the Natural Gas Act as controlling in construing Part II of the Federal Power Act. The effect is to assume that this court has overruled Connecticut Light & Power Co. v. Federal Power Comm., (1945) 324 U. S. 515.*

The Court of Appeals, in arriving at its conclusions here, follows cases under the Natural Gas Act. This is error. (1) The background and legislative history of the Federal Power and Natural Gas Acts are different. (2) There are differences in language between the two Acts. (3) The respective Acts have received different constructions in important respects (particularly as to where "local distribution" begins) by the Supreme Court in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 524, and *Federal Power Comm. v. East Ohio Gas Co.*, (1950) 338 U. S. 464. The effect of following the *East Ohio Case* in construing Part II of the Federal Power Act, as the Court of Appeals has done here by relying on *Wisconsin Michigan Power Co. v. Federal Power Comm.*, 197 F. 2d 472 (7th cir.), which in turn relies on the *East Ohio Case* and other cases under the Natural Gas Act, is to overrule the *Connecticut Light & Power Case.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 15, 1953.

APPENDIX

I. *Material portions from Federal Power Act* (Act of August 26, 1935, Ch. 687, 49 Stat. 838, U. S. C. Title 16 sec. 791a, et seq.)

1. Section 3, (3), (4), (7), (15) (16 U. S. C. sec. 796 (3), (4), (7), (15):

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * *

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

* * *

2. Section 201 (16 U. S. C. sec. 824):

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

3. Sec. 205 (16 U. S. C. sec. 824d):

Sec. 205. * * *

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

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No. 575

IN THE

Supreme Court of the United States

October Term, 1952

WISCONSIN POWER AND LIGHT COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.....

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WISCONSIN POWER AND LIGHT COMPANY,
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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on November 13, 1952, affirming an order of the Federal Power Commission issued on July 12, 1951, ordering Wisconsin Power and Light Company to file rate schedules for the sale of electric energy to four municipalities in Wisconsin for resale.

The State of Wisconsin through its attorney general, and the Public Service Commission of Wisconsin, are also petitioning this court for a writ of certiorari to review said judgment. The petitioner herein respectfully requests that this petition be considered by the court in connection with those petitions.

OPINION BELOW

The opinion of the Court of Appeals had not been reported in the Federal Reports up to the time of preparing this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 13, 1952. The jurisdiction of this court is invoked under 16 U. S. C., Section 825 1(b) and 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Does the Federal Power Act grant power to the Federal Power Commission to fix rates for the sale of electricity by Wisconsin Power and Light Company, a distributing company located in Wisconsin, to four small Wisconsin municipalities, Shullsburg (population 1306), Cuba City (population 1333), Benton (population 842) and Hazel Green (population 635), to the exclusion of the Public Service Commission of Wisconsin, which has regulated such sales over a period of forty years, where some of the electricity is purchased and received from Illinois, commingled with energy generated in Wisconsin, reduced in voltage from 34.5 kv. to 4 kv., and distributed to the four municipalities, as well as to mines and local residents of the area, the rates in the contract of purchase of the electricity generated in Illinois being regulated by the Federal Power Commission?

2. Does the Federal Power Act, which states that

> "such regulation, however, to extend only to those matters which are not subject to regulation by the states"

grant the Federal Power Commission authority to regulate the sales by the Wisconsin utility to the above named municipalities?

3. Does the Federal Power Act, which states that the Commission

> "shall not have jurisdiction except as specifically provided in this Part and the Part next following * * * over facilities used in local distribution"

grant power to Federal Power Commission to regulate the above mentioned sales by the Wisconsin utility to the municipalities?

4. Does the Federal Power Act, including the above quoted provisions, viewed in the light of our dual form of government and previous decisions of this court extending over 100 years, which declare that where Congress has not acted, the states have power to regulate matters which are of a local nature, although interstate commerce may be affected, and which are not in their nature national, and do not require one uniform system of regulation, grant power to the Federal Power Commission to fix rates for the sales by the Wisconsin utility to the municipalities?

5. Did the court err in concluding that where interstate commerce is involved, the controlling distinction is between wholesale and retail sales to the exclusion of consideration of whether the matter involved is local or national in character?

6. Can the Federal Power Commission fix rates for sales by the Wisconsin utility to the municipalities without first having made a finding of fact that such sales involve matters which are in their nature national, or admit only of one uniform system or plan of regulation?

7. Did the Federal Power Commission err in concluding, upon evidence which is undisputed, that the facilities used by the Wisconsin utility in furnishing service to the Wisconsin municipalities, are not facilities used in local distribution?

8. Did the court below err in holding that the section 201(b) exemption from Commission jurisdiction of

"facilities used in local distribution"

is inapplicable here?

9. Does interstate commerce cease when the electricity generated in Illinois is delivered to the control of Wisconsin Power and Light Company?

10. Is a municipality a "person" as defined by the Federal Power Act?

STATUTES INVOLVED

The portions of the Federal Power Act (16 U. S. C. sec. 791 (a) et seq., 49 Stat. 838) material to this case are printed in the appendix to this petition.

STATEMENT

Petitioner, Wisconsin Power and Light Company, is engaged primarily in the business of generating and distributing electric energy in south-central and eastern Wisconsin.

On May 19, 1950, the Federal Power Commission issued an order designating Wisconsin Power and Light Company an additional respondent in the proceedings instituted by order of the Commission on December 6, 1949, requiring (R. 4) Wisconsin Power and Light Company to show cause why it should not file rate schedules for service furnished

to the Village of Benton (population 842), City of Cuba City (population 1333), Village of Hazel Green (population 635), and City of Shullsburg (population 1306) in accordance with the provisions of Section 205(c) of the Federal Power Act.

Wisconsin Power and Light Company acquired the properties here involved and began operations of the properties on July 1, 1950 (R. 1066). The properties were previously owned by Interstate Light & Power Company of Wisconsin.

The energy furnished by Wisconsin Power and Light Company to the four municipalities above mentioned, and farmers and mine owners in the area, is in part generated in Wisconsin by Wisconsin Power and Light Company and in part generated at Galena, Illinois.

Wisconsin Power and Light Company purchases the energy generated at Galena, Illinois, pursuant to the terms of a contract which is filed with the Federal Power Commissison. It is conceded that the Federal Power Commission has jurisdiction of the transmission of electric energy from a generating plant at Galena, Illinois, to Wisconsin Power and Light Company in Wisconsin for resale.

The Federal Power Commission by order required that Wisconsin Power and Light Company, (the contract above mentioned had aready been filed) to file with that Commission, as a matter of rate regulation, the contracts between Wisconsin Power and Light Company and each of the four small municipalities pursuant to the terms of which Wisconsin Power and Light Company distributes the electric energy to the municipalities.

The energy enters Wisconsin by virtue of two lines with a voltage of 34,500 volts, and connects to lines in Wisconsin having the same voltage. After the electric energy is received at the state line by Wisconsin Power and Light Company, it is conducted by lines having a voltage of 34,500 northerly to Platteville and easterly to Shullsburg. Before the energy is delivered to farmers, municipalities and mine owners, it is stepped down to 4000 volts at five substations which are named, for the purpose of identification only, Cuba City substation, Hazel Green substation, Murphy substation, Vinegar Hill substation, and Calumet-Hecla substation. From these substations, lines carrying current at 4000 volts extend through the area and to the mines. A portion of the 4000 volt lines are supported by the same poles that support the 34,500 conductors, being below the 34,500 lines, and are referred to as an underbuild (R. 30, 31).

There are 376 rural customers served from these four thousand volt lines, and there are 4000 volt lines leading to the mines, namely, Little Mullen Mine, Chestnut Hill Zinc Company, Kittoe Mine, Deuce Mining Company, the Vinegar Hill Zinc Company, Benton Milling Company and Cuba Mining Company (R. 34-35).

The Village of Hazel Green is approximately three miles distant from the Hazel Green substation (R. 27). The Village of Hazel Green is fed off the same line carrying electricity at 4000 volts that is used to supply nearby farmers. The same is true of the Village of Benton, and also of the City of Cuba City. At Shullsburg the energy is transformed and reduced to 4000 volts and then delivered by means of the 4000 volt line to the city. There are 25 to 30

farm customers served off the same 4000 volt line that feeds Cuba City (R. 36), and there are approximately 20 farm customers served off the same 4000 volt line that feeds the Village of Hazel Green (R. 36-37), and approximately 30 farm customers are served off the same 4000 volt line that serves the Village of Benton (R. 37).

The 4000 volt energy delivered to farmers' premises is stepped down from 4000 volts to 115 or 230 volts for their use, and this involves a stepdown transformer on the customer's premises, which is owned by the Company (R. 38). The meter is usually located on the house or barn, or on a pole (R. 41), and the transformer is located a span or two from the meter (R. 41).

4000 volts is the primary distribution voltage at which service is furnished in the area to rural customers as well as to mines and to the municipalities (R. 52, 53).

Service is furnished to the mines after it is transformed and reduced to 4000 voltage (R. 53), with the exception of service to the Calumet Hecla Mine, where the energy is delivered at 34,500 kilowatts (R. 33).

The Public Service Commission of Wisconsin, and its predecessor the Railroad Commission, is and has been regulating the service to these four municipalities over a period of time commencing approximately in 1910 (R. 47). The right of the Public Service Commission to regulate these rates to the municipalities has heretofore never been questioned before any court (R. 49).

> "A uniform course of action involving the right to the exercise of an important power by the state governments for half a century, and this almost without

question, is no unsatisfactory evidence that the power is rightfully exercised." *Briscoe v. Bank of Commonwealth of Kentucky*, 12 U. S. 418.

REASONS FOR GRANTING THE WRIT

By virtue of the order of the Federal Power Commission, that Commission takes over, to the exclusion of the State of Wisconsin and its Public Service Commission, the fixing of electric rates for electric service in a local area of the State of Wisconsin. The decision of the court below affirming the order is contrary to well established constitutional principles supported by a long line of decisions of this court.

The question involved is of importance not only to the State of Wisconsin, but to every other state of the Union which is and has been fixing rates for electric utilities serving local areas which receive some electrical energy from outside the borders of the state. It involves the question of state control over local matters.

The effect upon the nation generally of vitalized local government with respect to local matters, can scarcely be over-estimated; much has been written about it, and the desirability of local tribunals controlling local matters is self evident. We do not deem it necessary here to expand upon that subject.

If a dispute should arise between the utility and its municipality customers, all that the municipality is required to do, under the law of the State of Wisconsin, is to communicate with the Public Service Commission of Wisconsin

with respect to this matter. It might be done on a postal card. Then the Commission is authorized, on its own initiative, to investigate and, if necessary, to hold a hearing and reach a determination, all without expense to the customer of the utility. (Section 196.28, Wisconsin Statutes, 1951.)

While the Federal Power Commission has authority to hold a hearing upon its own motion as well as upon complaint as to the reasonableness of rates, there is a decided disadvantage not only to the customers of the municipality, but also to the utility, to have such matters, heretofore regulated by the state, turned over to the Federal Power Commission for regulation, with headquarters in Washington. The Federal Power Act gives no assurance that the hearings wil be held other than in the City of Washington; parties may request, but cannot compel hearings elsewhere. This practice is contrary to the very genius of our government, as evidenced by the Tenth Amendment to the Constitution, and harks back to Magna Carta which provided that Common Pleas shall not follow the Court of the King, but shall be held in certain places, and provided for local courts to be held in every county.

It is quite evident, however, that in enacting the Federal Power Act, Congress did not intend to destroy local regulation in the states. The statute and the reports of the Committees of Congress are plain and positive upon this subject.

The Federal Power Act, Section 201 (a), in dealing with Federal regulation to the extent provided in part 2 and 3 of the Federal Power Act, states expressly that

> "such federal regulation, however, to extend only to those matters which are not subject to regulation by the states";

and, in Section 201 (b) of the Act, which states that the provisions of this part shall apply to the transmission of electric energy in interstate commerce, and to the sale of electric energy at wholesale in interstate commerce, it is further provided that

> "The Commission shall not have jurisdiction except as specifically provided in this part and the part next following, * * * over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."

The language of the statute is plain and its meaning does not appear to be doubtful. However, Congress itself construed the statute through the reports of its committees. The Senate Committee on Interstate Commerce in its report said:

> ". . . 'Subsection (a) * * * declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.' "
>
> *Connecticut L. & P. Co. v. Federal Power Comm.*, 324 U. S. 515, 526.

The House Committee on Interstate and Foreign Commerce in presenting the Federal Public Power Bill said:

> " 'The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. * * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State reguatory authority and contain throughout directions to the Federal Power Commission to receive and consider views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.'
>
> * * *
>
> " 'Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of this State. As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State.' "
>
> *Connecticut L. & P. Co. v. Federal Power Comm.*, 324 U. S. 515, 526, 527.

So the question naturally arises, What matters are not and what matters are subject to regulation by the States? The Federal Power Act had not been amended with respect to this question, and the same situation exists now that

existed in 1935 when Congress enacted Part II of the Federal Power Act.

At the time the Federal Power Act was enacted there had been decided the case of *Power Utilities Commission of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U. S. 83, holding that the states could not regulate the charges to be made by a producing company for sale of electricity transmitted across a state line to a distributing company at wholesale for resale. This case is mentioned in the report by the House Committee presenting the amended Federal Power Act Bill.

In deciding the *Attleboro case* that a state could not regulate the charges for electricity transmitted across the state line and sold at wholesale for resale, the court grounded its decision upon the fact that the business carried on between the companies was not local to either state, the court saying:

> "* * * Plainly, however, the paramount interest in the companies is not local to either state, but is essentially national in character."
>
> *Public Utilities Comm. v. Attleboro Steam & Elec. Co.*, 273 U. S. 83, 90.

The inability of the states to regulate charges for electricity transmitted across state lines and sold to a distributing company at wholesale for resale, has been called a "gap" because the Federal government had not acted on the subject and there was, therefore, no regulation. The purpose of the Federal Power Act was to close this gap.

At the time the Federal Power Act was enacted, it must be considered that Congress was familiar not only with

the *Attleboro case*, but other cases in this court dealing with the power of the states to regulate local matters, although such regulation might have an incidental impact or effect upon interstate commerce. *Cooley v. Board of Wardens of Port Philadelphia*, 12 How. (U. S.) 299; *Minnesota Rate Cases; Simpson v. Shepard*, 230 U. S. 352.

These two cases appear to be outstanding cases dealing with the state regulation of local matters.

In *Cooley v. Board of Wardens, supra*, the court ruled that where Congress had not acted on a particular subject, the states had the power to act, not by virtue of any consent of Congress implied or express, but by virtue of the constitutional power reserved to the states; that the grant of commercial power to Congress did not deprive the states of the power to regulate local matters.

In the *Minnesota Rate Cases*, Mr. Justice Hughes, in a thorough-going opinion citing numerous cases dealing with the subject, stated that there remains to the state until Congress acts, a wide range of exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected, and in the course of the opinion it is stated:

> "But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which

> nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."
>
> *Simpson v. Shepard*, 230 U. S. 352, 402.

The subsequent cases in this court evidence no retreat from the position taken in the two cases above cited. See *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U. S. 329; and *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179.

The provisions of the Federal Power Act (Section 201(b)) that the Commission, except as specifically provided in Part II and Part III, shall not have jurisdiction "over facilities used in local distribution", emphasizes the purpose of the Act to leave with the states the regulation of local matters.

(a) *Service Involved Herein Is Local*

Under the decision of this court in *Public Utilities Comm. v. Attleboro Steam & Elec. Co.*, 273 U. S. 83, the paramount interest in the transmission and sale of electric energy from Galena, Illinois, across the state line to Wisconsin Power and Light Company, is not local to either state but it is essentially national in character. With respect to the intrastate sales made by Wisconsin Power and Light Company, the distributing company, to customers in Wisconsin, the paramount interest is local, and service is clearly local distribution to a limited area.

All of the electric lines used to carry the energy to the farmers, mine owners and municipalities, are clearly used in local distribution. Delivery is made to the customers of the company, farmers, mines and municipalities, from the 4000 volt lines, which is the primary distribution voltage for service in this area. The 34,500 volt lines are necessary to carry the energy to points from which tap-off can be made to serve local customers. These 34,500 volt lines are used for this local purpose only; they are local transmission lines.

The question of voltage is not material since it might very well be good practice, depending upon the load, to increase the voltage, when received by the Wisconsin Power and Light Company, from 34,500 volts to 69,000 volts, and the primary distribution voltage might well be raised from 4000 volts to 12,000 volts. Local distribution is not limited to low voltage lines. Necessarily whatever voltage is required to give good service is commonly used.

The character of the service still remains local, irrespective of voltage, so long as the lines are devoted exclusively to serving the area here involved. And this is true even though the service is interstate in character. It has been held that the Natural Gas Act does not preclude the state from regulating interstate sales of natural gas made by an interstate pipe line carrier direct to industrial consumer, the holding being based on the local interest. *Panhandle Eastern Pipe Line Co. v. Public Service Comm.*, 332 U. S. 507.

This holding is in line with the decision of *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, that the transmission and sale of natural gas produced in one state and transported by means of pipe lines and directly furnished to consumers in another state, is interstate commerce, but nevertheless subject to regulation by the state because of the matter involves local interest although affecting interstate commerce.

And so, in the case at bar, the Federal Power Commission does not have jurisdiction since the matters involved are local and the facilities are used for local distribution.

The court below erred in concluding that where interstate transmission is involved, it is not necessary for the Commission to make a finding that the sales were "national in character."

This court has held that where the question is whether the facilities are or are not local distribution facilities, the Commission must make a finding in order that the reviewing court may know whether the Commission is intruding into excepted territory. If the facilities are used in local distribution, the order of the Commission must fall, since

the Commission has no jurisdiction over facilities used in local distribution. *Connecticut L. & P. Co. v. Federal Power Comm.*, 324 U. S. 515, 531, 532.

(b) *Sales of Electricity at Wholesale for Retail by Distributing Company, Does Not Give the Federal Power Commission Jurisdiction.*

The lower court stated that where interstate transmission is involved, the controlling distinction is between "wholesale and retail sales," and cites cases in support of that statement, but a reading of these cases disclose that they make no such distinction.

In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U. S. 329, the court held that sales of natural gas there under consideration although in interstate commerce were essentially local in aspect and subject to state regulation in the absence of federal regulation.

Panhandle Eastern Pipe Line Co. v. Public Service Comm., 332 U. S. 507, involved the sale of natural gas transported across state line and delivered to an industrial consumer. The court held that although the sales were interstate commerce, they were subject to state regulation because of their local character. The court said (page 517):

". . . The Act, though extending federal regulation, had no power or effect to cut down state power."

Colorado-Wyoming Gas Co. v. Federal Power Comm., 324 U. S. 626, is also cited to support the proposition that the distinction for interstate commerce is whether the sales are wholesale or retail. In this case the court held that

interstate commerce of natural gas for resale ends when the gas enters the service pipes of the distributing companies (page 631).

In *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, this court held that the state cannot regulate wholesale prices charged to local gas distribution companies but that with the delivery of gas to the distributing company, the interstate movement ends.

This case, therefore, is support merely for the proposition that the Federal Power Commission has jurisdiction of the transmission of electricity from Galena, Illinois, into the State of Wisconsin. This is admitted by all the parties here, and the contract has been filed with the Federal Power Commission, but the same case also denies any jurisdiction of the Federal Power Commission over sales by the distributing company.

In the case of *Public Utilities Comm. v. Landon*, 249 U. S. 236, the court holds that the states cannot regulate sales of gas across state lines to local distributing companies for resale, but the state can regulate the sale of gas by distributing companies to its customers, and that the second sale cannot be considered a part of interstate commerce.

It is certainly inadmissible to ground federal jurisdiction upon distinction between sales at retail or sales at wholesale for resale, where the service rendered is local and not national in character. Under the commerce clause, if Congress has not acted, the states have a constitutional right reserved to them by the Tenth Amendment to regulate such matters.

It is well understood that the Federal Power Act was not intended to, and does not take any power away from the states. If the service is, in fact, local and not national in character, it is wholly immaterial whether the sales are retail or wholesale. Until Congress acts, that matter is not a subject of federal jurisdiction, and the distinction suggested by the court does not seem to be a sound or practical distinction. Carried to its logical conclusion, it would, where any extra state energy is involved, give the Federal Power Commission jurisdiction over sales to trailer camps where the owner buys the energy and resells it to the occupants of the trailer camp. It is well known that the use of trailer camps throughout the country is growing by leaps and bounds, but we do not see any occasion for federal jurisdiction here. The same is true where landlords of apartment buildings sell electricity to their tenants. Under the distinction made by the court below, the landlord, when he resells, would be subject to the jurisdiction of the Federal Power Commission.

Furthermore, if the Village of Hazel Green, or any other of these municipalities, should sell its distribution system to Wisconsin Power and Light Company there would be no sale at wholesale for retail, and the federal jurisdiction would disappear with the change of ownership of title to the property, although not a single change would necessarily be made in the physical plant in order to continue service.

(c) *Interstate Commerce Ceases When the Out-of-State Energy Is Delivered to the Distributing Company.*

No claim is made that the entire service in the area involved is not local in character, and the evidence would not warrant a finding to the contrary. Federal Power Commission does not claim jurisdiction of the sales to mine owners or to farmers. It is difficult to see why sales to the municipalities are not just as much local as sales to the mines and to the farmers. The farmer gets his service off the same line that serves Hazel Green, and the same is true of the service to Cuba City and the service to Benton. Service to Shullsburg is at the end of the line and no farmers are served off the reduced voltage line.

When the energy received across the state line from Illinois is delivered to the Wisconsin Power and Light Company, the distributing company, that company has complete control of the situation and may step the energy up or may step it down, or do whatever may be necessary to render good local service to the communities in this limited area. The interstate character of the transaction terminates at the point of delivery of the energy to the local distributing company.

(d) *A Municipality Is Not a "Person" As Defined in the Federal Power Act.*

As defined in the Federal Power Act, a municipality is not a person, and is therefore not subject to the provisions of the Federal Power Act.

Section 3 of the Act, as amended, provides in part:

"Section 3. The words defined in this section shall have the following meanings for the purposes of this Act, to-wit:

"Section 3 (3): 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined;

"Section 3 (4): 'person' means an individual or a corporation;

"Section 3 (7): 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;"

Section 201 of the Act, as amended, provides in part:

"Section 201 (f). No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM RYAN,
Counsel for Petitioner.

January 20, 1953

APPENDIX

Portions of the Federal Power Act (21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stats. 838, 16 U. S. C. 719 (a) et seq.) material to the case:

"§3. The words defined in this section shall have the following meanings for purposes of this Act, to-wit:

"(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined:

"(4) 'person' means an individual or a corporation;

"(5) 'licensee' means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;"

* * *

"§201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists

of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

* * *

"§201. (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce, and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

* * *

"§201. (c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only in so far as such transmission takes place within the United States."

* * *

"§201. (d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale."

* * *

"§201. (e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

* * *

"§201. (f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

* * *

"§205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

* * *

"§205. (b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Com-

mission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect either as between localities or as between classes of service.

* * *

"§205. (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

* * *

"§205. (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the

thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 574

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, *Petitioners*

v.

FEDERAL POWER COMMISSION

No. 575

WISCONSIN POWER AND LIGHT COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

On Petitions for Writs of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

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MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The petitions for writs of certiorari in these cases seek to bring before this Court for review

the decision of the Court of Appeals for the District of Columbia Circuit affirming the Federal Power Commission's order asserting jurisdiction over the sales by the Wisconsin Power and Light Company of electric energy in interstate commerce to four municipally-owned distributing companies for resale to consumers in their respective municipalities of Benton, Cuba City, Hazel Green and Shullsburg, all in southwestern Wisconsin. The Federal Power Commission's order directed Wisconsin Power to file rate schedules for these wholesale sales with it in accordance with Section 205 of the Federal Power Act.

With the exception of a small amount of energy supplied by Wisconsin Power, the energy furnished these municipally-owned distributing companies is generated in Illinois by another company, which transmits it at 34,500 volts to the Illinois-Wisconsin boundary (R. 221). Wisconsin Power, in turn, transmits the energy from the state boundary over its own 34,500 volt lines to five substations from which it is transmitted over 4,000 volt lines and delivered to the four municipal distributing companies at the city limits (R. 221-223).

Wisconsin Power also serves the ultimate consumers in the City of Plattsville, Wisconsin, several industrial consumers, and about 400 rural consumers from these 4,000 volt lines. Except for the industrial consumers, however, the energy furnished is stepped down to 115 or 230 volts before

it is used by the consumers. The Federal Power Commission's order did not assert jurisdiction over these retail sales nor require the filing of rate schedules in regard thereto.

The court below noted that the facts and petitioners' principal contentions are "strikingly similar" to those in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission,* 197 F. 2d 472 (C.A. 7) pending on petitions for writs of certiorari, Nos. 291, 294, this Term. Since it thought that "it would serve no useful purpose to endeavor to supplement Judge Lindley's discussion of the governing legal principles" (R. 245), the court below adopted in effect the Seventh Circuit's opinion in the *Wisconsin-Michigan* case (R. 243-244):

> * * * There, as here, the issue was whether the Commission had jurisdiction, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, over the rates charged certain municipalities. In each case the petitioning company sold to the municipalities a supply of electric energy, some of which originated out of state, for resale by them to their residents. In each it was urged, on similar grounds, that this business was not covered by section 205. It is our view, as it was the Seventh Circuit's in the *Wisconsin-Michigan* case, (1) that these are sales at wholesale within the meaning of the definition contained in section 201(d); (2) that the section 201(b)

> exemption from Commission jurisdiction of "facilities used in local distribution" is inapplicable here, and the Company therefore is a public utility within the meaning of the definition in section 201(e); and (3) that a history of previously unchallenged regulation by the State does not oust the Commission of jurisdiction. * * *

The conclusion of the court below that the Federal Power Commission has jurisdiction over interstate wholesale sales of energy to municipally owned public facilities is in accord with the *Wisconsin-Michigan* decision and also with the Ninth Circuit's ruling in *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206, pending on petition for certiorari, No. 495, this Term, but is contrary to the decision of the Supreme Court of California in the cases argued in this Court during the January session. *United States* v. *Public Utilities Commission,* No. 205; and *County of Mineral* v. *Public Utilities Commission,* No. 206. The appropriate disposition of this question will, of course, depend upon the outcome of the latter cases. We assume that the Court will wish to defer action on the instant petitions for certiorari until those cases have been decided.

The other contentions advanced in the instant petitions are the same as some of those made in the *Wisconsin-Michigan* case. As shown in the Memorandum for the Federal Power Commission

filed in the *Wisconsin-Michigan* case (pp. 17-22), which is hereby incorporated by reference, the decision of the court below on these questions are in full accord with the decisions of this Court and there is no need for further review. Copies of that Memorandum are being furnished to counsel for petitioners.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

MARCH, 1953.

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